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No. 94-1310

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS,
Cross-Petitioners,

v.

YSLETA DEL SUR PUEBLO,
Cross-Respondent.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Ysleta del Sur Pueblo (Tribe) agrees with Cross-Petitioners that this case raises the issue of whether the Indian Gaming Regulatory Act (IGRA),[1] violates the Eleventh Amendment.[2] The Tribe would phrase the question differently: whether Congress, in the exercise of its plenary power under the Indian Commerce Clause, may abrogate the Eleventh Amendment immunity of states. Cross-Petitioners were correct in pointing out that this issue has been presented to this Court in other pending petitions for certiorari. Following the filing of the Condi-

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[1] 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-1168.

[2] U.S. Const. amend. XI.

tional Cross-Petition, this Court indicated its willingness to decide the issue by granting certiorari in *Seminole Tribe of Indians v. Florida*, U.S. Supreme Court No. 94-12, petition for certiorari granted 63 U.S.L.W. 3556, 3562 (January 23, 1995). The Tribe, the plaintiff in this case, joins with Cross-Petitioners, the defendants, in requesting that certiorari be granted. Because the issues are so closely related, the Tribe requests that this case be consolidated with *Seminole* to resolve the relationship between IGRA and the Eleventh Amendment.

OPINION BELOW

The order of the United States District Court for the Western District of Texas denying the State of Texas' motion to dismiss is not reported but is attached hereto at Appendix 1a-2a.[3]

STATEMENT OF THE CASE

The plaintiff in this case is an Indian tribe as defined by IGRA. Defendants are the State of Texas and its Governor (State). The Tribe brought suit under IGRA, after Texas refused to negotiate a compact to allow the Tribe to offer some forms of Class III gaming. Section 2710 (d)(7)(A)(i) of IGRA,[4] explicitly creates a new federal cause of action in a situation such as this, when a Tribe alleges a State has not negotiated or has not negotiated in good faith.

The trial court accepted and decided the suit, as it had to under IGRA. The State raised the Eleventh Amendment as a bar to the IGRA cause of action. The trial

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[3] Cross-Petitioners mention the District Court's order and reference the Appendix of Petitioner Tribe at 44a. The Order is not included in the Tribe's Appendix, but is misreferenced in its Petition as being at 44a. In that the State's error was occasioned by the Tribe's, the Tribe includes the Order in the Supplemental Appendix herewith.

[4] 25 U.S.C. 2710(d)(7)(A)(i).

court rejected that argument, holding that Congress had the power to abrogate the State's Eleventh Amendment immunity under its power and duty to regulate commerce with Indian nations. Finding no barriers to the suit, the trial court proceeded to decide the scope of gaming permitted to the Tribe under IGRA.

The Fifth Circuit reversed on the ground that the Restoration Act,[5] which restored federal recognition to the Tribe, somehow controls, completely cutting out IGRA. This decision created the anomalous situation of a court deciding a question neither requested nor raised by any party to the suit, while avoiding the federal cause of action which created the suit and which gave the federal court subject matter jurisdiction. It also forced the court to decide the major constitutional issue, but in the context of a little-known statute. As the State correctly notes in its Conditional Cross-Petition, "the Fifth Circuit decided an Eleventh Amendment question as to the Restoration Act which was not presented by the litigation while avoiding deciding the same question as it applies to the IGRA, the act pursuant to which the State was sued." Conditional Cross-Petition at p. 6 (footnote omitted).

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[5] 25 U.S.C. §§ 731 et seq. and 1300g et seq.

ARGUMENT

In their Question I, Cross-Petitioners state that the Fifth Circuit should have reached the question of whether Congress had the power under IGRA to abrogate the State's Eleventh Amendment immunity. They then ask this Court to conclude that Congress does not have the power to abrogate. The Tribe agrees that the Eleventh Amendment question should have been reached, but asks this Court to conclude that Congress's abrogation in IGRA was proper.

The Fifth Circuit's decision leaves the Tribe and State unable to determine who or what regulates gaming on the Tribe's land. Both the Tribe and State note that another tribe in Texas, the Kickapoo Traditional Tribe of Texas, has requested a compact under IGRA. The Kickapoo Tribe is not subject to the Restoration Act. All parties to this suit reject the notion that two different standards should govern identical forms of gaming on Indian land within a single state.

The Tribe asks this Court to resolve this impossible situation by looking to the plain language of the IGRA. All conflicts and confusion are eliminated if this Court holds that Congress had the power to enact a uniform, national regulatory scheme to control Indian gaming and that it did so in IGRA.

The State, in its Conditional Cross-Petition, also disagrees with the Fifth Circuit's discarding IGRA. However, Texas would like this Court to both bring back IGRA and yet limit its application. The State would like to use the uniform, national procedures created by IGRA. But, it would like to ignore IGRA's statutory provisions concerning the scope of Class III gaming.

The State's Conditional Cross-Petition's Question II requests this Court to construct a complicated reconciliation of IGRA with the Tribe's Restoration Act, to determine

the scope of Class III gaming available to the Tribe. The Tribe contends there is no need to reconcile the two Acts, because IGRA preempts the entire field of Indian gaming.

In addition, it should be noted that in this case, the trial court has already determined what games are available to the Tribe under both IGRA and the Restoration Act. When a Tribe requests a compact to engage in Class III gaming, IGRA requires the federal trial court to examine whether the State in which the Tribe is located "permits such gaming." [6] In this case the trial court explicitly held that the Tribe may engage in the Class III games it requested, because the State of Texas "permits" those same games.[7] The Restoration Act requires a court to make a similar, if not identical, inquiry to determine what games are prohibited on the Tribe's land.[8] Instead of using the phrase "permits such gaming," the Restoration Act states the test as "All gaming activities which are prohibited . . ." Again, the trial court explicitly held that the Tribe may engage in the gaming activity it requested, because the State of Texas does not prohibit that same gaming activity.[9] Because the Fifth Circuit reversed the trial court's decision on the ground that the Eleventh Amendment prevents the Tribe from suing the State in federal court, those determinations were not reversed by the Fifth Circuit. If a reconcilation of IGRA and the Restoration Act is necessary, it would be far easier and make much more sense to conclude that Congress intended that the standard for what gaming is "permitted" under IGRA is exactly the

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[6] 25 U.S.C. § 2710(d)(1)(B).

[7] Memorandum Opinion and Order at p. 20, Tribe's Appendix at 39a.

[8] 25 U.S.C. § 1300g-6.

[9] Memorandum Opinion and Order at p. 24, Tribe's Appendix at 43a.

same as the standard for what gaming is "not prohibited" under the Restoration Act.

CONCLUSION

It is in the interest of all States and all Tribes that this Court grant the petitions for writ of certiorari of both the Tribe and the State of Texas and decide the issue of whether or not Congress, in passing the Indian Gaming Regulatory Act:

(1) had the power to abrogate a State's Eleventh Amendment immunity, and

(2) intended that the Indian Gaming Regulatory Act establish a uniform, national Indian gaming regulatory scheme.

Respectfully submitted,

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APPENDIX

[Filed Jun 18, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-93-CA-29

YSLETA DEL SUR PUEBLO

v.

STATE OF TEXAS; and ANN RICHARDS,
Governor of the State of Texas

ORDER ON MOTION TO DISMISS

BEFORE THIS COURT, in the above-captioned cause of action, is Defendants' Motion to Dismiss filed May 20, 1993. The Plaintiff filed a timely Response on May 26, 1993. Having considered the Motion, the Response, and the relevant law, it is the opinion of this Court the Motion to Dismiss should be denied.

Defendants' Motion to Dismiss is pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant contends this Court lacks jurisdiction over this cause of action and Plaintiff has failed to state a cause of action upon which relief can be granted because the suit is barred by the Eleventh Amendment to the Constitution of the United States.

The Constitution of the United States was amended in 1798 to provide:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The plain language of the Eleventh Amendment prohibits suits in Federal court by citizens of one State against another State or by aliens against any State. In addition, the Supreme Court has construed the Amendment to prohibit suits against States by their own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 n.17 (1982); and suits against States by foreign states or sovereigns, *Monaco v. Mississippi*, 292 U.S. 313, 330 (1933); *Blatchford v. Native Village of Noatak*, —— U.S. ——, ——, 115 L.Ed.2d 686, 694, —— S.Ct. ——, —— (1991) (recognizing the sovereignty of Indian tribes). The premises upon which these constructions are based are that

> the States entered the [F]ederal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in [F]ederal court unless it has consented to suit, whether expressly or in the "plan of the convention."

Blatchford, —— U.S. at ——, —— S.Ct. at ——, 115 L.Ed.2d at 694-95, (citations omitted).

The Eleventh Amendment bar to suits against States is circumvented, however, when: (1) the State has waived the immunity and consented to the suit, *Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Papasan v. Allain*, 478 U.S. 265, 276 n.10 (1986); (2) Congress has clearly expressed its intent to abrogate or limit that immunity through its legislative authority, *Quern v. Jordan*, 440 U.S. 332, 333-34 (1979);

or (3) the suit is instituted under a fiction which allows suits for prospective injunctive relief against a State official in vindication of a Federal right, *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, (1908).

A State's waiver of its Eleventh Amendment immunity may be found "only where stated 'by the most express language or by such overwhelming implication from the text as [would] leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); *see also Ex Parte State of New York*, 256 U.S. 490 (1921).

Likewise, Congressional resolution to abrogate or limit a State's Eleventh Amendment immunity must be made clear by "an unequivocal expression of [C]ongressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst*, 465 U.S. at 99 (quoting *Quern*, 440 U.S. 332, 342); *accord Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 290-294 (1973).

And finally, the *Ex Parte Young* exception allows suit against a State if the suit challenges the constitutionality of a State official's action. This is so, the Court reasoned, because the suit could not be against the State—there would simply be no action on the part of the State since there can be no authorization by the State of the unconstitutional acts of its officials. *Ex Parte Young*, 209 U.S. at 159-160.

This Court is faced in Defendants' Motion to Dismiss with the second exception noted above—Congressional abrogation of Texas' immunity from suit. Plaintiff seeks, through the judicial process, to enforce rights created by the Indian Gaming Regulatory Act (the "IGRA"), 25 U.S.C. § 2701 *et seq.* (1988). Defendants claim Plaintiff's suit against them is barred by the Eleventh Amendment. In addition, Defendants' argue, the scheme set out in the

IGRA violates the Tenth Amendment to the United States Constitution.

This Court is in complete agreement with the views so aptly expressed by the United States District Court for the Southern District of Florida: Congress clearly intended to abrogate the States' Eleventh Amendment immunity by enacting IGRA and had the power to do so under the Indian Commerce Clause.[1] *Seminole Tribe of Florida v. State of Florida*, 801 F.Supp. 655 (S.D. Fla. 1992). Accordingly,

IT IS ORDERED Defendants' Motion to Dismiss is hereby DENIED.

SIGNED this 16th day of June, 1993.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
Senior District Judge

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[1] "The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art I, § 8, cl. 3.